JD–31–18
Clifton Park, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ADT LLC d/b/a ADT Security Services

and **Case 03-CA-202122**

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 43

Alexander J. Gancayco, Esq., for the General Counsel.
Bryan T. Arnault, Esq. (Blitman & King, LLP), of Syracuse, New York, for the Charging Party.
Jeremy C. Moritz, Esq. (Ogletree Deakins, Nash, Smoak & Stewart, PC), of Chicago, Illinois, for the Respondent.

BENCH DECISION AND CERTIFICATION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge: I heard this case on March 13, 2018, in Albany, New York. After the parties rested, I heard oral argument, and on April 23, 2018, issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1] The Conclusions of Law, Remedy, Order and Notice provisions are set forth below.

The complaint alleges, and I have found, that the Respondent had a duty to notify the Union that it was closing its office in Clifton Park, New York, which the parties' collective-bargaining agreement refers to as the "Albany facility." On about June 1, 2017, the Respondent announced that is would be closing this facility and did so a month later. Although I do not find that the Respondent breached its duty to notify the Union that it intended to close the facility, I

[1] The bench decision appears in uncorrected form at pp. 355 through 381 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this certification.

do find that it violated Section 8(a)(5) and (1) by failing to engage in timely bargaining concerning the effects of that decision.

As discussed in the bench decision, on June 15, 2017, Union President Patrick Costello sent a letter to the Respondent's regional human resources manager, Michael Stewart. This letter specifically claimed the right to bargain concerning the decision to close the Albany facility *and the effects* of that decision. It then made a request for specific information it needed for such negotiations and ended with the further request to "please provide your availability during the week of June 26th to commence bargaining over the Albany closure."

I conclude that this language reasonably would be understood as a request to bargain. Although these words—"over the Albany closure"—do not expressly mention bargaining over the effects of closing the facility, in an earlier paragraph of the letter Costello specifically referred to the Union's right to engage in effects bargaining. Therefore, I conclude that the June 15, 2017 letter reasonably would be understood to be a request to bargain over the effects of the Respondent's decision to close the Albany facility as well as over the decision itself. Accordingly, the General Counsel has carried the government's burden of proving that the Union, having received notice of the contemplated closing of the facility, requested to bargain over the effects.

The Union did not abandon its June 15, 2017 request to bargain. On July 11, 2017, the Union filed the initial charge in this matter and amended it on August 24, 2017. These charges certainly placed the Respondent on notice of the Union's continuing desire to engage in negotiations. Yet no bargaining of any kind took place until November 2, 2017.

In finding that this delay was unreasonable, and a breach of the Respondent's duty to bargain in good faith with the Union, I consider not only the nearly 5 month time period between the Union's initial request and the November 2, 2017 meeting, but also the fact that even unfair labor practice charges did not rouse the Respondent to its duty. In sum, I conclude that the Respondent closed the Albany facility without affording the Union an opportunity to bargain regarding the effects of that decision, as alleged in complaint paragraph VII(c), and that the Respondent thereby violated Section 8(a)(5) and (1) of the Act, as alleged in complaint paragraph IX.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. More specifically, it must mail to bargaining unit employees the notice attached hereto as Appendix B. It must also bargain with the Union concerning the effects of the closure of its Albany facility, and, to the extent it has not done so already, must furnish to the Union the requested relevant and necessary information.

Mailing of Notice to Employees

The Board customarily orders a respondent employer to post a notice at the workplace of

employees affected by the unfair labor practices. However, the Respondent closed that facility on July 1, 2017, and the bargaining unit employees, who perform their job duties primarily on customers' premises, now work out of their homes. Therefore, there is no facility at which the notice could be posted.

The Charging Party represents employees at some but not all of the Respondent's other facilities. These employees are not in the same bargaining unit as the employees affected by the closure of the Albany facility. They are not covered by the same collective-bargaining agreement applicable to the employees affected by the closure of the Albany facility, and the record does not suggest that they were affected by the unfair labor practices found herein. Accordingly, I conclude that it would not be appropriate to require the Respondent to post a notice at any of these other facilities.

In these circumstances, I conclude that the Respondent should be ordered to mail the notice to bargaining unit employees affected by the closure. Therefore, it is necessary to determine which employees should receive the mailed notices.

In *Excel Container, Inc.*, 325 NLRB 17 (1997), a case involving the closure of a facility, the Board decided that the employer should mail the notice to all employees *who had been employed on the date of the first unfair labor practice or thereafter*. Because the purpose of the notice was to make sure that employees knew the outcome of the unfair labor practice proceeding, the Board explained, the use of that date ensured that all employees who were exposed to the unfair labor practice and its effects would be notified of the outcome of the Board proceeding. Therefore, to determine which employees should receive the mailed notices, I must first pinpoint the date of the first unfair labor practice.

In *Willamette Tug & Barge Co.*, 300 NLRB 282, 283 (1990), the Board held that the union in that case was entitled to sufficient advanced notice of the closing as was needed for meaningful bargaining at a meaningful time. The Board did not specify exactly how soon before the closing date the employer had to provide the union such notice to allow for "meaningful bargaining at a meaningful time," but said that the Respondent's same day notice was "clearly insufficient."

In the present case, the record establishes that the Respondent announced that it intended to close the Albany facility on about June 1, 2017, one month before the actual closing. The evidence further shows that the Union knew of the Respondent's plan to close the facility on June 13, 2017, if not earlier, and that the Union requested to bargain by letter dated June 15, 2017. This letter also included the Union's information request.

What amounts to a "meaningful time for bargaining" will depend on the number and difficulty of the issues to be negotiated. In the present case, the employees continued to work, at the same pay and with no reduction in benefits, after the Albany facility closed, and the record does not suggest that the issues would be particularly difficult to resolve. Therefore, considered in isolation, the time period between notice to the Union and the closing of the facility arguably would not be unreasonable, and I have not found that the Respondent violated the Act by failing to give notice.

However, the complaint also alleges that the Respondent failed to furnish the Union with the requested information which the Union needed to engage in bargaining. Based upon the testimony of Respondent's labor relations director, James Nixdorf, quoted in the bench decision, I conclude that the Respondent could have furnished the Union the requested information in much less than the 15 days between the Union's request for it and the date the facility closed. Therefore, I further conclude that the delay in doing so already had become unreasonable by July 1, 2017, when the Respondent closed the facility.

Accordingly, it is consistent with *Excel Container, Inc.*, above, to order that the Respondent mail the notice attached as Appendix B to each bargaining unit employee who was on the Respondent's payroll as of July 1, 2017. The Respondent also must mail the notice to any employee hired into the bargaining unit thereafter. However, the record suggests that the Respondent did not hire any bargaining unit employees after July 1, 2017.

Bargaining Order

The remedy also must include an order requiring that the Respondent bargain with the Union about the effects of the closure of the Albany facility. Although the Respondent and Union did bargain briefly on November 2, 2017, the record does not establish that the parties reached agreement or bargained to a good faith impasse. Therefore, the Respondent's obligation to engage in effects bargaining with the Union continues.

The General Counsel and the Charging Party seek a remedy similar to that which the Board fashioned in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). For the reasons stated in the bench decision, I do not believe that such a remedy is appropriate in this case and do not recommend it.

Order to Furnish Information

The complaint also alleges, and the General Counsel has proven, that the Respondent failed and refused to furnish the Union with certain requested information, and unreasonably delayed in furnishing the Union with other requested information. The complaint further alleges that all the requested information was relevant to the performance of the Union's duties as exclusive bargaining representative, and necessary for that purpose. As discussed in the bench decision, I have found that, with one exception, the General Counsel has proven these allegations.

The exception concerns the Union's request for copies of "all reports, studies or analyses done by or for ADT, Protection 1, and/or Apollo that cover closing the Albany office, including reasons for doing so. . ." This information relates to the Respondent's decision to close its Albany facility but does not appear to be information relevant to or necessary for bargaining over the *effects* of that decision. Because the complaint neither alleges that the Respondent had a duty to bargain over its decision to close the Albany facility nor that it breached such a duty, I conclude that the Respondent did not have a duty to furnish this information.

Otherwise, the Respondent has a duty to furnish all the request information described in complaint paragraph VIII(a). The record indicates that the Respondent ultimately furnished the Union with much of this information, but unreasonably delayed in doing so. To the extent that the Respondent may have failed to furnish any of the requested information, or truthfully to advise the Union that the information did not exist, it must do so.

Conclusions of Law

1. The Respondent, ADT LLC, d/b/a ADT Security Services, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, International Brotherhood of Electrical Workers, Local Union 43, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material to this case, the Charging Party has been and is the exclusive bargaining representative, within the meaning of Section 9(a) of the Act, of the following unit of the Respondent's employees, which is an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees originally described in the certification dated November 20,1968 (Case Number 3-RC-4533) classified by the Employer as residential and small business installers, residential and small business high volume commissioned installers, residential and small business service technicians, employed by the Employer at its facility in Albany, NY; but excluding all alarm service investigators, relief supervisors, all office clerical employees and professional employees, guards and supervisors, as defined in the Act; and excluding all commercial installers and commercial service unless the employees are employed by the Employer and are located at, or are directly supervised by the Employer's supervisors located at its Albany, NY facility.

4. On about June 1, 2017, the Respondent announced its decision to close its facility at Clifton Park, New York (which the unit description in paragraph 3, above, calls the "Albany facility"), and on June 15, 2017, the Charging Party requested to bargaining regarding the effects of that decision on the employees in the bargaining unit described above in paragraph 3.

5. The Respondent unreasonably delayed in bargaining with the Charging Party over the effects of its decision to close its facility at Clifton Park, New York, thereby violating Section 8(a)(5) and (1) of the Act.

6. On June 15, the Charging Party requested that the Respondent furnish it with certain specified information related to the closing of the facility at Clifton Park, New York. This information was relevant to and necessary for the Union to perform its duties as the exclusive bargaining representative of the employees in the unit described above in paragraph 3.

7. As set forth above and in the appended bench decision, the Respondent failed and refused to furnish certain of the requested information described in paragraph 6 above,

unreasonably delayed in furnishing certain other portions of the requested information, and failed to timely inform the Union that portions of the requested information did not exist. It thereby violated Section 8(a)(5) and (1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. The Respondent did not engage in any unfair labor practices alleged in the amended complaint not specifically found herein.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended[2]

ORDER

The Respondent, ADT LLC d/b/a ADT Security Services, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with the Charging Party, International Brotherhood of Electrical Workers, Local Union 43 concerning the effects of its decision to close its facility at Clifton Park, New York.

(b) Failing and refusing to furnish the Charging Party, in a timely manner, with information it requests which is relevant to and necessary for the Charging Party to perform its duties as exclusive bargaining representative, and, in the case of requested information which does not exist, failing and refusing to inform the Charging Party, in a timely manner, that such information does not exist.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, promptly and in good faith bargain with the Charging Party concerning the effects of its closure of its facility at Clifton Park, New York.

---

[2] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

(b) To the extent that it has not already furnished the Charging Party with the information it requested on June 15, 2017 (except for the information found not relevant herein, related to reports, studies or analyses pertaining to the reasons for its decision to close the facility at Clifton Park, New York), promptly furnish such information to the Charging Party. If any such requested information does not exist, promptly inform the Charging Party of that fact.

(c) Within 14 days after service by the Region, duplicate and mail, at its own expense, to each employee who is now, or who has been at any time on or after July 1, 2017, a member of the bargaining unit described above in paragraph 3 of the Conclusions of Law, a copy of the attached notice marked "Appendix B."[3] In addition to mailing of the paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB 11 (2010).

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

Dated Washington, D.C. May 16, 2018

Keltner W. Locke
Administrative Law Judge

[3] If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX A

Bench Decision

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. The Respondent failed, in a timely manner, to furnish the Union with requested information relevant and necessary for the Union to bargain over the effects of the Respondent's decision to close its office serving Albany, New York. The Respondent also violated Section 8(a)(5) of the Act by failing to engage in timely effects bargaining.

The General Counsel and Charging Party seek a *Transmarine* remedy. In a typical plant closure case, employees lose their jobs and therefore the ability to place economic pressure on their employer by going on strike, which may warrant this remedy. However, when the Respondent closed its Albany office, the employees there continued to work out of their homes, continued to receive the same pay, benefits and union representation, and retained the same economic power. Therefore, a *Transmarine* remedy is not appropriate.

Procedural History

This case began on July 11, 2017, when the Charging Party, International Brotherhood of Electrical Workers, Local Union 43, filed the original charge against the Respondent, ADT LLC d/b/a ADT Security Services. This charge was docketed as Case 03–CA–202122. The Charging Party amended this charge on August 24, 2017.

After an investigation, the Regional Director for Region 3 of the Board issued a complaint and notice of hearing on October 27, 2017. On November 8, 2017, the Respondent filed a timely answer.

On February 27, 2018, the Regional Director issued an amended complaint and notice of hearing. On March 9, 2018, the Respondent filed a timely answer to the amended complaint.

On March 13, 2018, a hearing opened before me in Albany, New York. On that date, the parties completed the presentation of their evidence. I then adjourned the hearing until April 17, 2018, when it reopened by telephone conference call for oral argument. The parties also agreed that after oral argument, the hearing would adjourn until April 19, 2018, when it would resume by telephone for issuance of this bench decision.

On April 16, the Respondent's counsel was scheduled to appear on behalf of another client at a Board hearing on an unrelated matter, a representation case. The Board's amended Rules make such a representation case, figuratively, the equivalent of an express passenger train.

Had the hearing in this unrelated representation matter begun on April 16, 2018, it would not have caused the Respondent's counsel a scheduling conflict. However, the representation hearing was rescheduled to begin on April 17, 2018, albeit at a somewhat later time than the resumption of the hearing in the present case.

On April 17, 2017, the hearing in this matter resumed as scheduled. Counsel for the General Counsel and for the Charging Party presented their arguments. However, because of the conflict in the Respondent's counsel's schedule, requiring him to present oral argument at that time would have caused a delay in the opening of the representation hearing. Therefore, I adjourned the present hearing until April 19, 2018, at the same time it had been set to resume for the bench decision. Instead, the Respondent's counsel then gave oral argument and I adjourned the hearing until today, April 23, 2018, when it resumed for this bench decision.

Admitted Allegations

In its answer and by stipulation, the Respondent has admitted a number of allegations in the complaint.

Although the Respondent did not admit the dates the charge and amended charge were filed, it has admitted receiving them. Based upon those admissions, the certificates of service, the absence of any evidence contradicting these certificates, and the presumption of administrative regularity, I find that the General Counsel has proven that the charge and amended charge were filed and served as alleged in complaint paragraph I(a) and I(b).

The Respondent has admitted the allegations in complaint paragraphs II(a) and II(b), and complaint paragraph III. Based on these admissions, I find that the General Counsel has proven the allegations raised in those paragraphs.

Thus, I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that it meets the statutory and discretionary standards for the exercise of the Board's jurisdiction.

Paragraph IV of the amended complaint alleges that a number of named individuals are Respondent's supervisors. These include Labor Relations Director James Nixdorf and Regional Human Resources Manager Michael Stewart. The Respondent's answer to the amended complaint takes no position as to whether the individuals hold the positions alleged but does admit that all of these persons are its supervisors. However, although admitting their supervisory status, the Respondent denies that they are its agents.

Because they are supervisors, I conclude that they are Respondent's agents when exercising the official duties of their positions. In the case of labor relations and human resources personnel, those duties include dealing with labor organizations, including the Union. Further, based upon Nixdorf's testimony and documentary evidence with respect to Stewart, I find that these supervisors hold the titles of labor relations director and regional human resources manager, respectively.

The Respondent has admitted that the Union, the International Brotherhood of Electrical Workers, Local 43, is a labor organization within the meaning of Section 2(5) of the Act, as alleged in complaint paragraph IV. I so find.

The Respondent denied the allegations set forth in complaint paragraphs VI(a), VI(b), and VI(c) regarding the Union's status as bargaining representative, essentially because it disputed the accuracy of complaint paragraph VI(a)'s description of the bargaining unit. Instead, it averred that the appropriate bargaining unit was set forth in the collective-bargaining agreement to which it and the Union are parties.

The parties entered into the following stipulation: The Union is the Section 9(a) representative of the unit described in the collective-bargaining agreement, which is an appropriate unit under Section 9(b). I so find. More specifically, that unit, as described in the current 2015–2018 collective-bargaining agreement, is as follows:

All full-time and regular part-time employees originally described in the certification dated November 20,1968 (Case Number 03-RC-004533) classified by the Employer as residential and small business installers, residential and small business high volume commissioned installers, residential and small business service technicians, employed by the Employer at its facility in Albany, New York; but excluding all alarm service investigators, relief supervisors, all office clerical employees and professional employees, guards and supervisors, as defined in the Act; and excluding all commercial installers and commercial service unless the employees are employed by the Employer and are located at, or are directly supervised by the Employer's supervisors located at its Albany, New York facility. If during the term of this Agreement the Employer relocates the covered employees from the Albany, New York office to another, this provision shall apply to the new office.

Facts

The Respondent operates nationwide, providing alarm services to residences and businesses. The Union represents employees who install alarm systems in homes or small businesses and the technicians who service those systems. These employees perform their work on the customers' premises rather than at a central location.

Although the Union also represents employees at some of the Respondent's other locations, this case concerns only the employees who worked out of the Respondent's office in Clifton Park, New York, near Albany. Because the collective-bargaining agreement describes this location as its "Albany, NY facility," this decision will refer to it as the "Albany facility" unless clarity requires otherwise.

About June 1, 2017, the Respondent announced that it was going to close its office in Albany, New York. The complaint does not allege that the Respondent's decision to close this office violated the Act and the lawfulness of that action is not before me. However, even when an employer lawfully may decide to close a facility without bargaining with the union representing its employees, it still may have a duty to bargain regarding the effects of that action. The present complaint alleges that the Respondent had such a duty to engage in effects bargaining but failed to do so.

On June 13, 2017, the Respondent's director of labor relations, James Nixdorf, attended an unfair labor practice hearing at the Board's office in Albany, New York. So did the Union's

president, Patrick Costello, who is also the Union's assistant business manager. Nixdorf and Costello briefly discussed the Respondent's decision to close the Albany office.

Two days later, Costello sent a letter to the Respondent's regional human resources manager, Michael Stewart. The letter stated that the Union "reserved the right, as appropriate under the circumstances, to engage in decision and effects bargaining over the closure of the Albany office and reassignment of that office to a maintenance office. Effective bargaining cannot occur unless and until the Company has a definite plan for taking the action."

The letter then requested that the Respondent furnish the Union with certain specified information so that the Union could engage in informed bargaining. This request sought information on a number of subjects, but the complaint does not allege that the Respondent failed and refused to furnish or unreasonably delayed in providing the Union with all of the requested information. Rather, the complaint quoted only those portions of the information request pertaining to the alleged failure to produce or unreasonable delays in producing. Those portions of Costello's June 15, 2017 letter are as follows:

> 2. Copies of all reports, studies or analyses done by or for ADT, Protection 1, and/or Apollo that cover closing the Albany office, including reasons for doing so, when and how it would be done, labor issues to be dealt with and how those issues would be dealt with;
>
> 3. Copies of all writings and communications setting forth plans for taking action concerning the Albany office, and timetables for implementing those plans, and specific steps to be taken, including notification to and bargaining with this Union, and specific plans that have been made regarding a closure as pertaining to the Albany office and its employees, including, but not limited to, the impact on current installation technicians, and how service technicians will (1) receive parts, (2) dispose of e-waste, cardboard, etc., (3) be alerted to work orders and work schedules, and (4) attend monthly meetings, if held, and the location of such meetings;
>
> * * *
>
> 5. Existing plans for increases in the use of ADT subcontractors, by specific classification and numbers; and
>
> 6. Plans for supervision of the ADT bargaining unit. . .

The June 15, 2017 letter concluded "please provide your availability during the week of June 26th to commence bargaining over the Albany closure." I find that this sentence constitutes a request for bargaining. Although technically it only asks for dates when the regional human resources manager would be available, it reasonably would be understood as a request to negotiate.

With respect to the information requested, generally, information pertaining to

employees within the bargaining unit is presumptively relevant. *Caldwell Mfg. Co.*, 346 NLRB 1159 (2006); *CalMat Co.*, 331 NLRB 1084, 1095 (2000). Much of the information sought falls within that category but some of it may not enjoy the presumption.

Numbered paragraph 2 of the request seeks "Copies of all reports, studies or analyses. . .that cover closing the Albany office, including reasons for doing so, when and how it would be done, labor issues to be dealt with, and how those issues would be dealt with." Some of the requested information—concerning why the Respondent made the decision to close the Albany office—clearly would be useful to the Union in bargaining about the decision to close the Albany office because it would allow the Union to draft proposals which might provide the Respondent with an alternative to doing so. However, the complaint in this case raises no issue concerning the duty to bargain concerning the decision to close the facility and I presume that the Respondent lawfully made this decision unilaterally. Because the Respondent had no duty to bargain concerning the decision to close the office, the test of relevance does not concern the utility of the information to the Union in such negotiations.

It is not clear that reports and studies which showed only why the Respondent made its decision to close the Albany office would be of value to the Union in bargaining over the effects of that decision. However, reports, studies and analyses concerning "labor issues to be dealt with and how those issues would be dealt with" clearly would be relevant to effects bargaining. Moreover, the Board's standard, in determining which requests for information must be honored, is a liberal discovery-type standard. *United States Postal Service*, 337 NLRB 820 (2002); *Brazos Electric Power Cooperative*, 241 NLRB 1016 (1979).

The information described in numbered paragraph 2 of the Union's information request clearly pertains to bargaining unit employees and how they would be affected by the office closure, including how the employees' performance of certain identified tasks would be changed. Such information not only would be valuable to the Union during effects bargaining but would be essential. Without it, the Union would not know the specific impact of the change on employees' daily work and therefore would be disadvantaged in making proposals. Additionally, the sought information pertains to the work of unit employees and therefore is presumptively relevant.

With respect to the request for information for plans to increase the use of subcontractors, the record reflects that the Respondent sometimes contracted with outside sources for the performance of certain bargaining unit work. The closure of the Albany office raised the distinct possibility of an increase in such work to the detriment of the bargaining unit employees. Indeed, there were only 3 employees in the unit when the Albany office closed and only 2 at the time of the hearing, which suggests that it would not take a great increase in outsourcing of work to cast doubts on the unit's continued existence. That indeed might be a possible effect of the closure, and the information sought is highly relevant to the Union in preparing for effects bargaining.

With respect to the request for information about plans for supervision of the bargaining unit employees, the record indicates that they already were under supervision by a manager who did not work in the Albany office, but that possibly this function might be performed by a

supervisor at an even more distant location. However, it is not obvious that the shift from a supervisor at a distant location within the state of New York to a supervisor in, for example, the state of Utah, would have any impact on the working conditions of the bargaining unit employees.

An employer's selection of supervisors ordinarily is not a mandatory subject of bargaining. *Bridgeport and Port Jefferson Steamboat Co.*, 313 NLRB 542, 545 (1993). However, the Union's intent here was not to seek to bargain over the identity of the supervisors but rather to consider whether the location of the supervisors, who would be exercising their supervisory authority remotely, would affect the employees' conditions of employment. Even though it is not obvious how the location of a remote supervisor would affect the employees' working conditions, it is a novel issue and arguably the Union might propose that the supervisors communicate with the employees in a particular manner. Although that is somewhat speculative, the Board applies, as already noted, a broad discovery-type standard. I conclude that under this broad standard, the Respondent had a duty to furnish the requested information.

In sum, I conclude that the Respondent did not have a duty to provide copies of reports, studies or analyses showing the reason for the Respondent's decision to close its Albany office. However, I further conclude that otherwise, the Respondent did have a duty to provide the information sought in numbered paragraphs 2, 3, 5, and 6 of its June 15, 2017 information request, because this information was relevant to, and necessary for the Union to discharge its duty as the bargaining unit employees' exclusive bargaining representative.

The Respondent closed its Albany office on about July 1, 2018, and the 3 bargaining unit employees then began working out of their homes. At that time, the Union had not received a response to its June 15, 2017 information request.

When the Union still had not received the requested information by July 11, 2017, it filed the unfair labor practice charge which began this proceeding. When it amended this charge on August 24, 2017, it still had not received the requested information.

As already noted, the Union's June 15, 2017 letter to the Respondent's regional human resources manager not only requested information, but also asked to "commence bargaining over the Albany closure." This request reasonably would be understood to include both bargaining over the Respondent's decision to close its Albany office and also bargaining concerning the effects of that decision should the Respondent be unwilling to leave that office open. Obviously, the Union would seek to minimize any adverse effects of the closure on the bargaining unit employees' work.

The Respondent's failure to respond to this June 15, 2017 letter constitutes a failure to engage in bargaining as well as a failure to furnish the requested relevant information.

Although the Union had filed an unfair labor practice charge against the Respondent on July 11, 2017, and amended it on August 24, 2017, the Respondent did not offer to bargain with the Union about the effects of the Albany office closing until September 20, 2017. On that date, the Respondent's director of labor relations, James Nixdorf, sent an email to Union President

Costello. The email stated, "the Albany SSO is slated for closure at the end of the month. Do you have time next week to bargain over the effects? I'm free Wednesday and Thursday."

It is not entirely clear why the email stated that the Albany office would close at the end of September when, in fact, it had been closed almost 3 months earlier, on about July 1, 2017. Likewise, it is unclear why Nixdorf decided to raise the matter of bargaining on September 20, 2017, rather than shortly after receipt of the Union's June 15, 2017 bargaining request. That same letter also included the Union's information request, and Nixdorf explained the delay in responding to that request as follows:

> Q. Can you explain for the Judge, the delay in compiling that response?
> A. I knew that the—since there wasn't really any change, I had a number of negotiations that were going on simultaneously. I knew that if it had been a, you know, an urgent issue, I would have probably heard from Pat. He would have given me a call.
>
> Q. Okay. But why did the issue lack urgency?
> A. Because we were keeping terms and conditions status quo.

In other words, the Respondent did not believe it had made any change in working conditions and therefore did not assign a high priority to replying to the June 15, 2017 letter.

Nixdorf also testified that he did not believe that the union president, Patrick Costello, felt any urgency about the matter. If Costello had considered it urgent, Nixdorf reasoned, he would have called Nixdorf.

The Union's filing an unfair labor practice charge against the Respondent on July 11, 2017, did not appear to alter Nixdorf's belief that replying to the June 15 letter was not an urgent duty. The unfair labor practice charge alleged that the Respondent had violated the Act both by failing and refusing to bargain with the Union and by failing and refusing to furnish the information requested by the Union.

Nixdorf's testimony suggests he may not have been too concerned about the charge because he believed that language the Respondent's collective-bargaining agreement constituted a waiver of the Union's right to bargain over the office closure and therefore allowed the Respondent to act unilaterally. However, the charge specifically alleged both a failure to bargain over the decision itself and also a failure to bargain over the effects.

The Union amended the charge on August 24, 2017, and this amended charge also alleged, among other things, that the Respondent had refused to bargain about the decision to close the facility *and its effects*. Both the charge and the amended charge reasonably should have set off alarms in the Respondent's human resources department, but if so, the alarms went unanswered. Not until September 20, 2017, did the Respondent reply to the Union's June 15, 2017 request to bargain.

Union President Costello replied to Nixdorf's September 20 email the next day. Costello said that he would have to get back to Nixdorf the following week because another Union official, who would be taking over the representation of the Albany employees, was out of town. On September 26, 2017, Costello sent the following email to Nixdorf:

> Jim,
>
> On June 15th of this year I sent you a request for information concerning the closure of the Albany Office of ADT. In order for us to bargain over the effects that this closure will have on our members we need this information. Please review my letter of June 15 and forward to my office the information that we have requested and then we can set up a time to get together.
>
> Sorry for the delay in getting back to you.
>
> Pat

That same day, Nixdorf replied, sending Costello documents, including a PowerPoint presentation and copies of internal communications regarding management's decision to close the Albany office. On October 3, 2017, Nixdorf sent Costello an email providing additional information. On October 4, 2017, Costello emailed Nixdorf, stating that the earliest the Union would be able to meet would be the week of October 30 and the week of November 6. Nixdorf and Costello ultimately agreed to meet on November 2.

At that meeting, the Respondent, by Nixdorf, made an offer to transfer the 2 remaining employees in the Albany bargaining unit to the bargaining unit represented by the Union at the Respondent's Syracuse facility. Nixdorf clarified this offer in an email to Costello the same date, which indicated that the Albany employees could keep their seniority. This email also included the Respondent's proposal reduced to writing.

By November 10 email, Nixdorf asked Costello if there were any updates. Costello replied the next day, stating "Not yet. Next week," On November 11, Costello emailed Nixdorf asking about the status of the remaining employees in the Albany bargaining unit. The Respondent had offered to transfer them to its Syracuse facility and Costello inquired as to whether they had been asked to relocate to Syracuse or to the Respondent's office in Rochester, New York, or whether they remained employed at Albany.

At that time, as well as 4 months later at the time of hearing, the 2 service technicians remained employed at Albany, and working out of their homes. There has been no change in pay or benefits, and little change in working conditions. However, some testimony indicated that they now had to receive shipments of parts at their homes and to deposit electronic waste at a different location.

Complaint Paragraphs VII(a), (b) and (c)

I find that the General Counsel has proven that about July 1, 2017, Respondent closed its

Clifton Park, New York location and designated the Albany, New York area as out of market, as alleged in Complaint paragraph VII(a). However, the fact that the Respondent designated the Albany area as "out of market" - meaning that it no longer needed an office there - is relevant only to explain why it decided to close its office at Clifton Park.

Complaint paragraph VII(b) alleges that the "subject set forth above in paragraph VII (a) relates to wages, hours, and other terms and conditions of employment of the Unit and is a mandatory subject for collective bargaining." The complaint does not allege that the Respondent had a duty to bargain over its decision to close its office and therefore I do not reach the issue of whether that decision was a mandatory subject of bargaining. However, I do conclude that the Respondent had a duty to bargain over the effects of that decision.

Complaint paragraph VII(c) alleges that Respondent closed its Albany office without affording the Union an opportunity to bargain with Respondent with respect to the effects of this conduct. I find that the Respondent ignored the Union's June 15, 2017 request to bargain until September 2, 2017. Meanwhile, on July 1, 2017, it closed the Albany office. Further, I conclude that this delay constituted a refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

Complaint Paragraphs VIII(c), (d) and (e)

Complaint paragraph VIII(c) alleges that since about September 26, 2017, Respondent has replied, in part, to the Union's request for certain information by means of incomplete communications and, thus, has failed and refused to furnish the Union with the information requested by it as described above in paragraph VIII(a)(1). That complaint subparagraph alleges, and the evidence establishes, that since about June 15, 2017, the Union requested that the Respondent furnish the following: "Copies of all reports, studies or analyses done by or for ADT, Protection 1, and/or Apollo that cover closing the Albany office, including reasons for doing so, when and how it would be done, labor issues to be dealt with and how those issues would be dealt with."

As discussed above, I have concluded that records, studies and analyses that cover closing the Albany office, including reasons for doing so, are not relevant to the Union's duty and need for bargaining information, to the extent such documents concern only the Respondent's decision to close the office, because the Respondent had no duty to bargain with the Union about the decision to close the office. Documents pertaining to "labor issues to be dealt with and how those issues would be dealt with" are relevant to the Union's bargaining duty and need for information, but the evidence does not establish that the Respondent withheld or failed to furnish the Union with any such document within its possession or under its control. Therefore, I conclude that the General Counsel has not proven that the Respondent failed to furnish the Union with such requested information.

However, for reasons which will be discussed further below, I do conclude that the Respondent unreasonably delayed in furnishing information, or in informing the Union that no information existed, with respect to the Union's request for information regarding "labor issues to be dealt with and how those issues would be dealt with."

Complaint paragraph VIII(d) alleges that from "about June 15, 2017, to about September 26, 2017, Respondent has unreasonably delayed in informing the Union that the information requested by it as described above in paragraphs VIII(a)(3) and VIII(a)(4) does not exist." That information consisted of "existing plans for increases in the use of ADT subcontractors, by specific classification and numbers" and "plans for supervision of the ADT bargaining unit."

As already discussed, although an employer is not required to bargain over which people it selects to be supervisors, the Union is not seeking information for such a purpose. Rather, it is concerned that changes in the "remote supervision" of employees, with the supervisor being in Utah rather than closer to Albany, New York, will have an impact on working conditions. Under the Board's broad discovery-type standard, I conclude that the sought information is relevant and, therefore, the Respondent had a duty to furnish it or to inform the Union it did not exist. Further, I find that the Respondent did neither until September 26, 2017.

A delay from June 15, 2017, to September 26, 2017, is not reasonable, particularly when the actual change in working conditions took place on July 1, 2017. Moreover, the Respondent has offered no persuasive reason for the delay. The Respondent's labor relations director, James Nixdorf, testified in part as follows on cross-examination:

Q. And when you got the information request on June 15th, you didn't pick up the phone and call Pat and say what's this all about? We just had a conversation two days ago, and you told me everything's fine.
A. Again, the—the terms and conditions were remaining the same—

Q. That's not the question. Did you or did you not pick up the phone and call Pat?
A. No.

Q. Okay. And so between June 15th and September 20th, there is no communication between you and Pat about this?
A. Correct.

Q. And there is no response to Pat's information request, correct?
A. Yes.

Q. Okay. And your counsel seems to say that there's some difficulty obtaining this information, putting it together, right?
A. Correct.

Q. How long did it take you to obtain this information from Amy Root, Mr. Massaglia, and Mr. Stewart?
A. So on the—on the day that I asked for it?

Q. Yeah.
A. Yeah. It didn't take all that long to get it.

Essentially, the Respondent offers no reason for its delay in providing any of this

information except that the employees' working conditions had not changed and therefore providing the information was not a high priority.

Complaint paragraph VIII(e) alleges that from about June 15, 2017, to about October 2, 2017, Respondent unreasonably delayed in furnishing the Union with the information requested by it as described above in paragraph VIII(a)(2). The requested information is that in numbered paragraph 3 of the Union's June 15, 2017 letter to the Respondent, and that paragraph is quoted in full above.

The evidence establishes that the Respondent did delay from June 15, 2017, to about October 2, 2017 in furnishing this information to the Union. For reasons already stated, I conclude that the Respondent has offered no legitimate reason for delaying until 3 months after the change in working conditions took place before furnishing the Union with the requested information.

In sum, I conclude that the Respondent failed and refused to furnish the Union with some of the requested information, and unreasonably delayed in furnishing other portions of the requested information or in advising the Union that such information did not exist. Further, I conclude that the Respondent thereby violated Section 8(a)(5) and (1) of the Act, as alleged in complaint paragraph IX.

Transmarine Remedy

For the reasons stated above, I have found that the Respondent failed and refused to bargain in good faith with the Union concerning the effects of its decision to close its Albany, New York office. The General Counsel and Charging Party seek a remedy similar to that which the Board imposed in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). In that case, an employer withheld from the union representing its employees information that it was about to close its terminal, resulting in those workers losing their jobs. Although a court of appeals found that the employer did not have an obligation to bargain over the decision to close its facility, the Board held on remand that the employer nonetheless had a duty to bargain about the effects of that decision. However, the employer had failed to offer the union the opportunity to engage in such negotiations until 7 months after the facility had closed.

At that point, the employees possessed no economic power. Because the facility no longer was operating, a threat to go on strike would have no force. A bargaining order, by itself, would result only in pro forma negotiations. The Board fashioned an order which would, at least in part, make the employees whole for losses they suffered because the employer unlawfully had concealed its intention to close its terminal. The Board therefore issued, in addition to a bargaining order, an order requiring the employer to pay the employees at their normal wage rates from 5 days after the Board's order until the earliest of the following conditions: (1) The date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closing of its facility on its employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 days of the date of this Decision and Order, or to commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; and (4) the Union's subsequent failure to bargain in good faith. However, the Board's

order further provided that "in no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent terminated its operations, to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. However, the Board's order further provided "that in no event shall this sum be less than the employees would earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ." *Transmarine Navigation Corp.*, 170 NLRB 389 at 390. See also *Young World Stores*, 321 NLRB No. 117 (1996); *Inabon Asphalt, Inc.*, 325 NLRB No. 50 (1998); *Melody Toyota*, 325 NLRB 846 (1998).

Thus, the *Transmarine* remedy seeks to restore to the now-unemployed workers a modicum of bargaining power. However, for 2 reasons, I do not believe it is relevant here.

Unlike in *Transmarine Navigation Corp.*, the Respondent in this case did not conceal the fact that it intended to close its Albany office. It announced that fact a month in advance. However, it then delayed in furnishing the Union the requested information and in offering the Union opportunity to bargain about the effects.

Even more significant is the fact that no employees lost their jobs because of the closure of the Albany office. The employees continued to work at the same rates of pay, with the same benefits, and under essentially the same conditions. Arguably, their work became slightly more difficult because they now had to receive and keep certain parts in their homes and had to go to a different place to dispose of old electronic components. However, they continued to work and continued to be represented by the Union. Therefore, their ability to place economic pressure on the Respondent, by going on strike, remained unchanged.

In this circumstance a *Transmarine* remedy would not be appropriate. Moreover, considering that the employees already are being paid, requiring any additional compensation would not be remedial but punitive. Therefore, I believe, the Board does not have statutory jurisdiction to issue such an order. See *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952)("a back pay order is a reparation order designed to vindicate the public policy of the statute by making the employee whole for losses suffered on account of an unfair labor practice"); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941) (the objective is to restore "the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination"); *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348 (2007).

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, further discussion of the appropriate remedy, Order and Notice. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

All counsel in this proceeding demonstrated a civility and professionalism which contributed to the efficient trial of this matter and which I truly appreciate. The hearing is closed.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT fail and refused to bargain in good faith, and at reasonable times, concerning the effects of our decision to close our facility at Clifton Park, New York (the "Albany facility").

WE WILL NOT fail and refuse to provide, or unreasonably delay in providing, relevant information requested by the Union, International Brotherhood of Electrical Workers, Local Union 43, the exclusive bargaining representative of an appropriate unit of our employees, which the Union needs to bargain with us concerning the effects of our decision to close the Albany facility.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL bargain in good faith with the Union concerning the effects of closing our Albany facility.

WE WILL provide to the Union, without unreasonable delay, information it requests which is relevant to and necessary for it to perform its duties as the exclusive representative of an appropriate unit of our employees, including promptly notifying the Union if such requested information does not exist.

ADT, LLC d/b/a ADT Security Services
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Niagara Center Building, 130 S. Elmwood Avenue, Suite 630, Buffalo, NY 14202-2465
(716) 551-4931, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/03-CA-202122 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (518) 419-6669.